

NTSB Order No. EA-4040

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 6th day of December, 1993

Docket SE-11349

Aviation Regulations ("FAR"), 14 C.F.R. Part 91, but found that respondent did not violate FAR sections 61.3(a) and 91.9 (now 91.13), 14 C.F.R. Parts 61 and 91.<sup>2</sup> As a result, the law judge modified the sanction from revocation to a 270-day suspension.<sup>3</sup>

Included in the Administrator's Order of Revocation (which

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<sup>2</sup>The above-referenced regulations provide:

**§ 91.95 Restricted and prohibited areas.**

(a) No person may operate an aircraft within a restricted area (designated in Part 73) contrary to the restrictions imposed, or within a prohibited area, unless he has the permission of the using or controlling agency, as appropriate.

**§ 91.102 Flight limitation in the proximity of space flight operations.**

No person may operate any aircraft of U.S. registry, or pilot any aircraft under the authority of an airman certificate issued by the Federal Aviation Administration within areas designated in a NOTAM for space flight operations except when authorized by ATC, or operated under the control of the Department of Defense Manager for Space Transportation System Contingency Support Operations.

**§ 61.3 Requirement for certificates, rating, and authorizations.**

(a) Pilot certificate. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part. However, when the aircraft is operated within a foreign country a current pilot license issued by the country in which the aircraft is operated may be used.

**§ 91.9 Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>The §§ 61.3 and 91.9 charges relating to two separate incidents were neither upheld nor appealed and thus, need not be discussed. The Administrator appealed the 91.9 finding only as it related to the operation of an aircraft in a restricted area designated in a NOTAM (Notice to Airmen) for space flight operations. Both parties filed appeal and reply briefs.

served as the complaint) were the following allegations:

3. On or about December 1, 1988, Respondent operated as pilot-in-command of civil aircraft N598M, in the vicinity of Cape Kennedy Space Center, Florida.
4. During the December 1, 1988 flight, Respondent operated N598M within restricted area R2934 without the permission of the using or controlling agency.
5. At the time of the December 1, 1988 flight, restricted area R2934 had been designated in a NOTAM [Notice to Airmen] for space flight operations.

On appeal, the Administrator argues that the law judge should have affirmed the charge under FAR § 91.9 because the incursion into restricted airspace was careless. Respondent admitted that he inadvertently operated his aircraft within the restricted area near the Kennedy Space Center on December 1, 1988, but claimed that this occurred because, through no fault of his own, his navigational radio became inoperative during flight.

Therefore, he contends, the law judge's imposition of a 270-day suspension is excessive and inconsistent with Board precedent. He further asserts that precedent calls for a suspension of 20 days. In reply, the Administrator seemingly acquiesces to the premise that a suspension of 270 days is excessive by asserting that respondent's act of operating an aircraft in a restricted area designated in a NOTAM for a space shuttle launch warrants a 180-day suspension.

Based on our consideration of the briefs of the parties and the record, the Board concludes that safety in air commerce or air transportation and the public interest require that both the Administrator's and respondent's appeals be granted, in part, as

hereafter discussed.

According to respondent, he was aware of the NOTAM regarding the space flight operations and knew that his intended course from Ft. Pierce, Florida, to Savannah, Georgia, would bring him close to the restricted area. He testified that although he had a radio on board his aircraft, it could only be operated for either communication or navigation, but not for both simultaneously. After speaking with Miami Center and being advised that the best course was to head toward Orlando, respondent claims he tuned to the Orlando VOR on his navigational radio. He assumed the radio was working properly until he noticed an FAA Beech Baron aircraft flying beside him. When he tried to communicate with the aircraft, he realized that the radio was inoperative.

The Administrator argues that respondent's entry into the restricted airspace was careless and, therefore, a 91.9 violation should be sustained because respondent flew VFR,<sup>4</sup> using an old KX-145 navigational radio, on a course that he knew took him close to the area restricted for a shuttle launch, while conditions were overcast with winds aloft up to 60 knots. The Administrator further asserts that respondent's actions created potential endangerment because, if his aircraft had developed engine failure, it could possibly have collided with the space shuttle. While we find this scenario a remote possibility, we believe a 91.9 charge is still supportable. There were many

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<sup>4</sup>Visual flight rules.

authorized aircraft in the restricted airspace and respondent's unauthorized presence created potential endangerment.

As the law judge found (and respondent does not contest), N598M drifted into restricted airspace, in violation of FAR §§ 91.95(a) and 91.102. This alone is enough to support a residual finding of a 91.9 violation. Cf. Administrator v. Johnson, NTSB Order EA-3796 at 6, n. 5 (1993), and cases cited therein. Despite the Administrator's argument that adequate basis exists for a 91.9 charge separate from the residual finding, the record neither compels nor requires the Board to reach this issue. The argument that it is careless to fly 1) near restricted airspace designated in a NOTAM for space operations, 2) with a single radio for navigation and communication, 3) when it was quite windy and overcast is not without some merit. The combination of these elements, however, resulted in the proven violations of §§ 91.95(a) and 91.102 which, since they already support the residual finding of a 91.9 violation, will control the Board's evaluation of the appropriate sanction.

Regarding the Administrator's assessment that a 180-day suspension is warranted, Board precedent does not support such a severe sanction. An examination of the relevant precedent reveals that a 30-day suspension is justified in this instance.

Guidance may be gleaned from Administrator v. Whitley, 5 NTSB 1224 (1986), in which the respondent was found to have violated 91.95(a) and 91.9 by operating an aircraft in airspace

restricted for a space shuttle launch. It was determined that the respondent had not checked the latest NOTAM before flight. The Board upheld a 20-day suspension that had been reduced by the law judge from one of 30 days. See also Administrator v. Worden, 5 NTSB 2333 (1987)(30-day suspension for flying into the prohibited airspace surrounding President Reagan's ranch; a violation of 91.9 was not sustained); Administrator v. Madole, 4 NTSB 387 (1982)(the respondent flew into an area of live artillery firing, in violation of 91.95(a); 30-day suspension); Administrator v. Strock, 4 NTSB 349 (1982)(violations of 91.95(a) and 91.9 found; the Administrator did not appeal the law judge's reduction of sanction from 60 to 15 days); Administrator v. Preston, 3 NTSB 3730 (1981)(the Board upheld a 60-day suspension of the respondent's ATP certificate when, on a passenger-carrying flight, he passed through a restricted area where air-to-air missile testing was in progress, in violation of 91.95(a) and 91.9).

The Administrator has not explained why the Board should deviate so markedly from past cases. As a result, we find that a 30-day suspension is justified and consistent with Board precedent.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal with regard to the finding of a violation of FAR § 91.9 is granted;
2. The respondent's appeal with regard to the reduction in sanction is granted, in part; and
3. The 30-day suspension of respondent's airman certificate shall begin 30 days after service of this order.<sup>5</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

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<sup>5</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).